SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ORITO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 70-69. Argued January 19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Appellee was charged with knowingly transporting obscene material by common carrier in interstate commerce, in violation of 18 U. S. C. § 1462. The District Court granted his motion to dismiss, holding the statute unconstitutionally overbroad for failing to distinguish between public and nonpublic transportation. Appellee relies on *Stanley* v. *Georgia*, 394 U. S. 557. *Held:* Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that *Stanley* protected does not extend beyond the home. See *United States* v. *12 200-Ft. Reels Film*, *post*, p. —; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. —. This case is remanded to the District Court for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California*, *ante*, p. —; *United States* v. *12 200-Ft. Reels*, *supra*, and this opinion. Pp. 2-6.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 70-69

United States, Appellant, v. George Joseph Orito. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with a violation of 18 U. S. C. § 1462[1] in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials. . . ." The materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

[1] 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

. . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Ninth Amendment rights.[1] The District Court granted his motion, holding that the statute was unconstitutionally overbroad since it failed to distinguish between "public" and "non-public" transportation of obscene materials. The District Court interpreted this Court's decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Redrup* v. *New York*, 386 U. S. 767 (1967), and *Stanley* v. *Georgia*, 394 U. S. 557 (1969), to establish the proposition that "non-public transportation" of obscene materials was constitutionally protected.[2]

Although the District Court held the statute void on its face for overbreadth, it is not clear whether the statute was held to be overbroad because it covered transportation intended solely for the private use of the transporter, or because, regardless of the intended use of the materials, the statute extended to "private carriage" or "nonpublic" transportation which in itself involved no risk of exposure to the children or unwilling adults. The United States brought this direct appeal under the former 18 U. S. C. § 3731 (1964 ed.) now amended, 1971 Pub. Law 91-644 § 14 (a). See *United States* v. *Spector*, 343 U. S. 169, 171 (1952).

The District Court erred in striking down 18 U. S. C. § 1642 and dismissing respondent's indictment on these "privacy" grounds. The essence of respondent's conten-

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[1] Appellee also moved to dismiss the indictment on the grounds that 18 U. S. C. § 1462 does not require proof of *scienter*. That issue was not reached by the District Court and is not before us now.

[2] The District Court stated:

"By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors. . . . I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes." 338 F. Supp. 308, 310 (1970).

tions is that *Stanley* has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); and *United States* v. *Reidel*, 402 U. S. 351 (1971). Those holdings negate the idea that some zone of constitutionally protected privacy follows such materials when they are moved outside the home area protected by *Stanley*.[4] *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (opinion of WHITE, J.) (1971). *United States* v. *Reidel*, *supra*, 402 U. S., at 354–356 (1971). See *United States* v. *Zacher*, 332 F. Supp. 883, 885–886 (ED Wis. 1971). But cf. *United States* v. *Thirty-Seven Photographs*, 402 U. S., at 379 (STEWART, J., concurring (1971).

The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); *Griswold* v. *Connecticut*, *supra*, 381 U. S., at 486 (1965); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). But viewing obscene films in a commercial theater open to the adult public, see *Paris Adult Theatre I* v. *Slaton*, — U. S. — (pp. 15–17) (1973), or transporting such films in common carriers in interstate commerce, has no such claim to such special con-

[4] "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs *in the privacy of his own home*." *Stanley* v. *Georgia*, *supra*, 394 U. S., at 565 (1968). (Emphasis added.)

sideration.[5] It is hardly necessary to catalog the myriad activities that may lawfully be engaged in within the privacy and confines of the home, but may be prohibited in public. The Court has consistently rejected constitutional protection for obscene material outside the home. See *United States* v. *Twelve 200-Ft. Reels*, — U. S. — (pp. 4–6) (1973); *Miller* v. *California*, — U. S. — (pp. 8–9); *United States* v. *Reidel*, *supra*, 402 U. S., at 354–356 (1971) (opinion of WHITE, J.); *id.*, at 357–360 (Harlan, J., concurring); *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957).

Given (a) that obscene material is not protected under the First Amendment, *Miller* v. *California*, *supra*, *Roth* v. *United States*, *supra*, (b) that the government has a legitimate interest in protecting the public commercial environment by preventing such materials from entering the stream of commerce, see *Paris Adult Theatre*, *supra*, — U. S., at — (pp. 8–15) (1973), and (c) that no constitutionally protected privacy is involved, *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.), we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the

[5] The Solicitor General points out that the tariffs of most, if not all, common carriers include a right of inspection. Resorting to common carriers, like entering a place of public accommodation, does not involve the privacies associated with the home. See *United States* v. *Thirty-Seven Photographs*, *supra*, 402 U. S., at 376 (1971) (opinion of WHITE, J.); *United States* v. *Reidel*, *supra*, 402 U. S., at 359–360 (1971) (Harlan, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 551–552 (1961) (Harlan, J., dissenting); *Miller* v. *United States*, 431 F. 2d 655, 657 (CA9 1970); *United States* v. *Melvin*, 419 F. 2d 136, 139 (CA4 1969).

transporter. That the transporter has an abstract proprietary power to shield the obscene material from all others and to guard the material with the same privacy as in the home is not controlling. Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent. Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene materials, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause. See *Paris Adult Theatre* v. *Slaton*, *supra*, — U. S., at — (pp. 8–14) (1973). See also *United States* v. *Alpers*, 338 U. S. 680, 681–685 (1950); *Brooks Weber* v. *Freed*, 239 U. S. 325, 329–330 (1915). "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray* v. *United States*, 195 U. S. 27; *Sonzinsky* v. *United States*, 300 U. S. 506, 513, and cases cited." *United States* v. *Darby*, 312 U. S. 100, 115 (1941). "It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature." *North American Co.* v. *Securities and Exchange Comm'n*, 327 U. S. 686, 705 (1946).[6]

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[6] "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil

As this case came to us on the District Court's summary dismissal of the forfeiture action, no determination of the obscenity of the material involved has been made. Today, for the first time since *Roth* v. *United States*, 354 U. S. 476 (1957), we have arrived at standards accepted by a majority of this Court for distinguishing obscene material, unprotected by the First Amendment, from protected free speech. See *Miller* v. *California*, *supra*, — U. S., at — (pp. 8–10) (1973), *United States* v. *Twelve 200-Ft. Reels of Super 8mm. Film*, *supra*, — U. S., at — (p. 7, n. 7) (1973). The decision of the District Court is therefore vacated and the case is remanded for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California*, *supra*, *United States* v. *Twelve 200-Ft. Reels*, *supra*, and this opinion.

Vacated and remanded.

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or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. . . . In the *Lottery Case*, 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. . . . In *Hoke* v. *United States*, 227 U. S. 308 and *Caminetti* v. *United States*, 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. . . . In *Weber* v. *Freed*, 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralising effect of such exhibitions in the State of destination." *Brooks* v. *United States*, *supra*, 267 U. S., at 436–437 (1925).

SUPREME COURT OF THE UNITED STATES

No. 70-69

United States, Appellant, v. George Joseph Orito.	On Appeal from the United States District Court for the Eastern District of Wisconsin.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Stanley* v. *Georgia*, 394 U. S. 557, that an individual reading or examining "obscene" materials in the privacy of his home is protected against state prosecution by reason of the First Amendment made applicable to the States by reason of the Fourteenth. We said:

> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books

he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*, at 565.

By that reasoning a person who reads an "obscene" book on an airline or bus or train is protected. So is he who carries an "obscene" book in his pocket during a journey for his intended personal enjoyment. So is he who carries the book in his baggage or has a trucking company move his household effects to a new residence. Yet 18 U. S. C. § 1462* makes such interstate carriage unlawful. Appellee therefore moved to dismiss the indictment on the ground that § 1462 is so broad as to cover "obscene" material designed for personal use.

The District Court granted the motion, holding that § 1462 was overbroad and in violation of the First Amendment.

The conclusion is too obvious for argument, unless we are to overrule *Stanley*. I would abide by *Stanley* and affirm this judgment, dismissing the indictment.

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*"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."

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MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 18 U. S. C. § 1462, which makes it a federal offense to "[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face:

> "To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives: on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transpor-

tation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional." 338 F. Supp. 308, 311 (ED Wis. 1970).

Under the view expressed in my dissent today in *Paris Adult Theatre* v. *Slaton*, *post*, it is clear that the statute before us cannot stand. Whatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face. See my dissent in *Miller* v. *California*, *ante*. I would therefore affirm the judgment of the District Court.